August 3, 2000

Ms. Sherry Green
U.S. Environmental Protection Agency
Office of Site Remediation Enforcement (MC 2272A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Re: Superfund Recycling Equity Act ("SREA")

Dear Ms. Green:

The American Chemistry Council appreciates the opportunity to comment on EPA's June 14, 2000 notice regarding the possible issuance of EPA guidance addressing the meaning of "reasonable care" and related issues under section 127 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. § 9627. 65 Fed. Reg. 37,370 (June 14, 2000).

The American Chemistry Council represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $435 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The American Chemistry Council (formerly the Chemical Manufacturers Association) has been actively and constructively involved in all aspects of the Superfund program since its inception in 1980. We have not always seen eye-to-eye with EPA on every issue, but we have always worked to help make the Superfund program a success, and we are proud of that track record.

Our industry was therefore concerned when a liability exemption for scrap recyclers was introduced in the 106th Congress. We believed such an exemption was not justified by the facts and would simply shift Superfund liability to other parties at the same sites to which the scrap recyclers had contributed their own hazardous substances.

Once the SREA legislation was enacted into law, however, our primary focus shifted to interpreting the new law in a sensible fashion to avoid unjust results. We have followed with great interest the recent debate over the meaning of "reasonable care" in new section 127 of CERCLA. Under the American Chemistry Council's Responsible Care® program, companies, as a condition of membership, commit to implementing environmental management systems to make health, safety and environmental protection an integral part of the design, manufacture, use, recycling and disposal of our products. A key component involves working with customers, carriers, suppliers, distributors and contractors to foster safe use, transport, recycling and disposal. With regard to the exercise of "reasonable care," we offer the following comments.

For transactions occurring after February 27, 2000, the SREA provides a liability exemption only if certain conditions are satisfied. In particular, the liability exemption applies only

> if the person who arranged for the transaction . . . can demonstrate by a preponderance of the evidence that . . . the person exercised reasonable care to determine that the facility was in compliance with . . . any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the . . . recyclable material.

42 U.S.C. § 9627(c)(5) (emphasis supplied).

The American Chemistry Council finds it deeply distressing that those who stand to benefit financially from this exemption are now urging EPA to develop guidance that would drain the meaning from each one of its requirements. If interpretations such as this were to prevail, the result would be a liability exemption with no basis whatsoever in environmental protection. We discuss below several specific concerns.

1. Burden of proof

As a threshold matter, the SREA clearly places the burden of proof squarely on the person claiming the exemption. Liability is eliminated only "if the person who arranged for the transaction can demonstrate by a preponderance of the evidence that" each of the SREA conditions, including the "reasonable care" condition, is met. The burden of proof does not rest with EPA or with a PRP group that is seeking contribution; it rests instead with the scrap seller. The American Chemistry Council believes that EPA should emphasize and reinforce this important point. This should be done in any amicus briefs filed by the United States in pending litigation, and also in any guidance that EPA may decide to issue.

2. Preponderance of the evidence standard

We note with great concern the comment made by the Institute of Scrap Recycling Industries (ISRI) that the preponderance standard "is a relatively low standard that merely means it is more probable than not that the criteria [for the exemption] were met." Far from being a "relatively low" standard, the preponderance standard is the dominant standard in civil litigation of all kinds. It is the one standard by which the federal judges and juries daily decide the civil cases within their jurisdiction.

3. Reasonable care

We note with even greater concern that, according to the comments filed by ISRI, a scrap seller need do virtually nothing in order to meet the SREA's standard of "reasonable care." Specifically, according to ISRI, the scrap seller:

- Can rely entirely on information provided by a third-party broker, rather than from the recycler itself;
- Can accept at face value any information the recycler provides;
- Need not actually visit the recycling facility at any time;
- Need not make any inquiry of any federal, state, or local regulatory agencies;
- Need not await a response from any regulatory agency if any inquiry is made;
- Need not make any further inquiry when the recycling facility later changes hands; and
- Need not be concerned with any violations that are "undisclosed" to the regulatory agencies.

This is hardly a prescription for understanding the compliance status of the recycler. Indeed, the picture gets even worse in light of the information provided to EPA at the July 17 public meeting.

At that meeting, for example, one speaker pointed out that "[t]he law does not require [scrap recyclers] to supply compliance information, so most refuse to provide it."[1] His company had recently sent out 300 letters seeking compliance information and received only 15 responses. In other words, the ISRI approach to "reasonable care" is premised on scrap sellers making compliance inquiries to which they do not expect to obtain any response at all. We thus agree completely with the observation recently made by the Copper & Brass Fabricators Council in their comments that "EPA should not lower the bar and make it easier for scrap sellers to take advantage of the exemption provision just because they did not make the effort to obtain minimal information about a customer's facilities."

[1] 31 Env't Rptr. (BNA) 1513 (July 21, 2000).

Whether or not EPA decides to issue any guidance on the meaning of "reasonable care," the American Chemistry Council believes that EPA should recognize the danger in allowing scrap sellers to divest themselves of all responsibility for determining whether they are dealing with legitimate and lawful operators. In fact, because the SREA does not even require that any of the scrap must actually be recycled in order to qualify for the exemption, the "reasonable care" test is the only element of environmental protection to be found. If that test is watered down in the manner urged by ISRI, then the SREA will become a blanket exemption for all those who deal in scrap, regardless of the environmental consequences of their activities.

If you have any questions regarding these comments, please feel free to contact Kerry Kelly at (703) 741-5163.

Very truly yours,

Dell E. Perelman
Waste Issues Team Leader and
Senior Counsel